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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 271

RETAIL CLERKS UNION, LOCAL NO. 1364, AFL-CIO, an unincorporated association; BUTCHERS UNION, LOCAL NO. 352 OF THE AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, an unincorporated association; FIVE COUNTIES CENTRAL LABOR COUNCIL, an unincorporated association; HARTLY L. WEINGARTNER; HARRY McNINCH and ROBERT GIESICK,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF TRINITY, CORNELIUS A. HOOD, ALTA R. HOOD, GUY McTIMMONDS, and PATRICIA L. McTIMMONDS, individually and as co-partners, doing business as the H & M Super Market, a partnership,

Respondents.

PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of California.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF TRINITY, CORNELIUS A. HOOD, ALTA R. HOOD, GUY MCTIMMONDS, and PATRICIA L. MCTIMMONDS, individually and as co-partners, doing business as the H & M Super Market, a partnership,

Respondents.

PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of California.

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California rendered on May 19, 1959.

CITATIONS AND OPINIONS BELOW.

The order for preliminary injunction and preliminary injunction of the Superior Court in and for the County of Trinity dated October 18, 1957 is printed in Appendix "A", *infra*, page i. The judgment and order of the Superior Court in and for the County of Trinity, a Court of general jurisdiction, denying petitioners' motions to dismiss, dated February 25, 1958, is printed in Appendix "B" hereto, *infra*, page vii. The judgment and order of the District Court of Appeal of the State of California, Third Appellate District, denying petitioners' petition for writ of prohibition is printed in Appendix "C" hereto, *infra*, page viii. The opinion of the Supreme Court of the State of California, rendered on May 19, 1959, is printed in Appendix "D", hereto, *infra*, page ix, is reported in 52 Adv. Cal. Rpts. 232.

JURISDICTION.

The judgment of the Supreme Court of the State of California was entered on May 19, 1959, Appendix "D", page ix, *infra*. A timely petition for rehearing was filed and denied on June 18, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATUTE INVOLVED.

The statutory provisions involved are:

The Labor Management Relations Act, 1947, as amended; 29 U.S.C. 141, et seq. (Taft-Hartley Act); hereinafter referred to as the "Act".

QUESTIONS PRESENTED.

The decision of the majority of the California Supreme Court in this case raises the following questions:

1. May a state Court assert *primary* jurisdiction to determine initially the question of whether or not federal administrative and judicial agencies have exclusive jurisdiction over a dispute between labor and management?

2. May a state Court assert jurisdiction to issue injunctive relief *pending* its determination of whether or not federal administrative or judicial agencies have exclusive jurisdiction over the subject matter of the action involving a labor-management dispute?

3. May a state Court assert jurisdiction to require the parties to a labor-management dispute to litigate in a state Court, the issues of whether or not the doctrine of federal preemption is applicable thereto?

4. May a state Court assert jurisdiction to award injunctive relief in a labor-management dispute despite an admission by the plaintiffs that they are engaged in a business affecting interstate commerce within the meaning of the Act?

STATEMENT OF THE CASE.

On September 18, 1957, plaintiffs filed a complaint requesting injunctive relief and damages. Said complaint was filed in the Superior Court of the State of California, in and for the County of Trinity, a Court of general jurisdiction, and purported to allege that

the defendants had demanded that plaintiffs sign and accept certain collective bargaining agreements containing union shop provisions and that defendants, on August 9, 1957, placed a picket at plaintiffs' place of business in the County of Trinity, State of California, to coerce and intimidate plaintiffs to accept said demands. The above entitled conduct was alleged in the complaint to be violative of the ordinance of the County of Trinity, No. 228, which was enacted on August 18, 1957, and became effective on September 18, 1957. The complaint further alleged that the conduct was violative of Ordinance No. 228 for the reason that said enactment prohibited union security agreements of any type.

The conduct alleged in the complaint involved *peaceful* picketing only and the sole basis for the complaint was the violation of the local ordinance which prohibited union security agreements of any type.

On September 27, 1957, defendants filed a demurrer to said complaint, together with a supporting memorandum of points and authorities, including a challenge to the jurisdiction of the Superior Court on the grounds that the ordinance was invalid and on additional grounds that the subject matter of the action as to the defendants, or any of them, was within the exclusive jurisdiction of judicial and administrative agencies of the United States.

On October 15, 1957, the trial Court issued a decision overruling the demurrer and on October 18, 1957, issued an order for preliminary injunction and preliminary injunction restraining defendants, during

the pendency of the action and until further order, from engaging in any picketing, boycott, strike or threats for the purpose of forcing and inducing plaintiffs to make an agreement requiring plaintiffs' employees to become or remain members of defendant Retail Clerks Union, Local No. 1364 or Butchers Union, Local No. 352, or any other labor organization in order to obtain, retain or continue employment with plaintiffs *in violation of Ordinance No. 228.*

Defendants subsequently filed an answer and cross-complaint, including affirmative defenses in the former, challenging the jurisdiction of the trial Court on the grounds stated above, and, including in the latter, an allegation that plaintiffs and each of them, individually and as members of an employer association had unlawfully and illegally interfered with, coerced and restrained their employees from the exercise of their right to freedom of association, self-organization and designation of representatives of their own choosing.

On November 15, 1957, plaintiffs filed a verified answer to said cross-complaint specifically alleging and *admitting* that the trial Court lacked jurisdiction of the subject matter of the cross-complaint because the exclusive jurisdiction thereof was with the National Labor Relations Board, an agency of the United States of America. *Thus, the plaintiffs admitted that their business was one which affected interstate commerce within the meaning of the Act.*

On November 25, 1957, defendants filed a motion to dismiss and vacate the judgment of the trial Court

and its order for preliminary injunction and preliminary injunction. These motions were based upon plaintiffs' admission with respect to federal jurisdiction as to the identical controversy, fact situation and parties alleged and enumerated in the complaint and that said controversy, fact situation and parties were governed by the same principles and provisions of law as were applicable to the matters alleged in the complaint.

After oral argument and submission of additional memoranda of points and authorities at the request of the trial Court, the motions were denied on February 25, 1958, whereupon petitioners, on March 7, 1958, filed a petition for alternative writ of prohibition in the District Court of Appeal in the State of California, Third Appellate District.

The petition for writ of prohibition was based upon the order denying defendants' motions to dismiss and upon the fact that defendants had no speedy or adequate remedy to prevent further proceedings to be taken in the matter by the trial Court and for the reason that, notwithstanding the above objections, allegations and admissions with respect to the exclusiveness of federal jurisdiction, the trial Court had ruled that it was possessed of jurisdiction as to *all aspects* of the controversy and that it was possessed with jurisdiction to issue injunctive relief and damages, as prayed for in the complaint.

The petition for alternative writ of prohibition was denied by the District Court of Appeal without opinion on March 27, 1958, whereupon defendants, on

May 1, 1958, filed a timely petition for hearing by the Supreme Court of the State of California. Said petition for hearing and the alternative writ of prohibition were granted by the California Supreme Court.

The bases for the petition for hearing in the California Supreme Court were as follows:

1. That the county ordinance upon which the injunction was based was an invalid exercise of the police powers as to the municipal corporation.

2. That the county ordinance upon which the injunction was based was invalid because it was too vague to be capable of enforcement.

3. That the county ordinance upon which the injunction was based was invalid because of its extra-territorial effect.

4. That the county ordinance upon which the injunction was based was invalid because it was contrary to state law and policy.

5. *That the exclusive jurisdiction of the subject matter of the action before the trial Court was with the judicial and administrative agencies of the United States and state Courts were preempted from acting.*

After oral arguments before the California Supreme Court a decision was rendered on May 19, 1959, to which Chief Justice Gibson and Justice Traynor dissented with respect to several grounds, including the issue of federal preemption. The majority of the California Supreme Court held that the County Ordinance No. 228 upon which the injunction was based

was invalid and was contrary to state law and policy, but at the same time, held that the state Courts had jurisdiction to issue injunctive relief without regard to the federal question involved and without regard to the fact that the ordinance upon which the injunction was based was invalidated by its own decision.

Petitioners filed a timely petition for rehearing *after the decision* of the California Supreme Court and said petition was denied on June 18, 1959.

In this regard the majority of the California Supreme Court held:

> ". . . we agree with the superior court that in the present state of the record there is an unresolved 'factual question' (in addition to questions of law) upon which the determination of jurisdiction may eventually depend. At the present time the allegations as to jurisdiction show at most that upon further proceedings in the basic action questions of federal preemption *may* be presented; but they show also that no such issue is ripe for resolution in this proceeding." (52 A.C. 2d 232, 236)

THE REASONS FOR GRANTING PETITION.

1. The conclusions reached by the majority of the California Supreme Court with respect to the issue of federal preemption under the Act and with respect to the issue of whether state or federal tribunals have primary jurisdiction to determine issues of such preemption are directly contrary to the decision of this Court in *San Diego Building Trades Council v. Garmon*, 353 U.S. 26 (1957); *Amalgamated Meat Cutters,*

etc. v. Fairlawn Meats, 353 U.S. 20 (1957); *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957); *Local 24, International Brotherhood of Teamsters, et al. v. Oliver*, ... U.S. ....., 79 S. Ct. 297 (1959); *Hotel Employees Union, Local No. 255 v. Sax Enterprises*, ... U.S. ....., 79 S. Ct. 273 (1959); *San Diego Building Trades Council, et al. v. J. S. Garmon, et al.*, ... U.S. ....., 79 S. Ct. 773 (April 20, 1959); *Grocery Drivers Union, etc. v. Seven Up Bottling Co., Inc.*, ... U.S. ..... (May 4, 1959).

I.

IT IS CLEAR THAT THE SUBJECT MATTER OF THIS ACTION IS WITHIN THE EXCLUSIVE AND PRIMARY JURISDICTION OF FEDERAL JUDICIAL AND ADMINISTRATIVE TRIBUNALS AND THAT STATE COURTS HAVE BEEN PREEMPTED TO ASSERT JURISDICTION IN SUCH MATTERS.

Having in mind the primary nature of the picketing involved in this controversy, that is, peaceful picketing for organizational purposes, the conflict between the decision of the majority of the California Supreme Court and the decisions of this Court become startling, indeed. The majority of the California Supreme Court holds that state tribunals have *primary* jurisdiction to determine whether the doctrine of federal preemption is applicable to a particular labor-management dispute and that a preliminary injunction is properly issuable by the state tribunal *pending* its determination of this issue even though the conduct of the defendants is completely protected or completely unlawful or a combination of

both under the Act. This attitude and holding of the majority is indicated by its statement excerpted above.

The point need not be belabored at this stage of the proceedings that the issuance of a preliminary injunction by a state Court pending its determination of whether or not federal preemption exists, is as much a regulation of labor-management relations, in the sense of the above-cited decisions of this Court, as it would be if the state Courts were permitted to assert jurisdiction as to the entire controversy and as to all stages of the proceedings. From a practical standpoint, it would mean that whatever *lawful* action a labor organization might take pursuant to the provisions of the Act, the state Courts could, nevertheless, issue injunctions to thwart the purposes of the Act under the guise of determining whether or not the doctrine of federal preemption is applicable.

This is precisely the type of situation which this Court, in now numerous decisions, has assiduously precluded and is precisely the reason why the doctrine of *primary jurisdiction* was noted by this Court in its latest *Garmon* decision, *supra*, in part:

Chief Justice Gibson and Justice Traynor, in their dissent, comment upon the erroneousness of the position taken by the majority and upon the applicability of this Court's holding in the recent *Garmon* decision, *supra*, when they state:

> "The Garmon case dealt with a business that affected interstate commerce and was reversed on the question of federal preemption in San Diego

> Building Trades Council v. Garmon, ... U.S. ..... (79 S. Ct. 773, 3 Law. Ed. 2d 775). Moreover, it was decided on an erroneous assumption [in the state court] that the conduct found tortious under state law was also illegal under federal law. As the United States Supreme Court pointed out, however, it was by no means clear that the conduct involved violated federal law. In fact, it may have been protected by that law. (See Labor Management Relations Act, Sections 7, 8(b), 29 U.S.C. Sections 157, 158(b)). If, despite these weaknesses in this court's Garmon decision, the majority opinions in the present case *adhere to it* on the questions of the illegality of union or closed shop contract and considered activity to achieve them under state law, it would be necessary to determine if that case controls the present ones." (At pp. 240-241, emphasis added)

Thus, the dissenters clearly point out that the determination of whether or not the conduct involved in this case is either protected or prohibited by the Act, must be initially decided by federal agencies and tribunals and point out that the majority decision is adhering to its position in the second *Garmon* case, 49 Cal. 2d 595 (1958), with respect to the issue of federal preemption, despite reversal of the state Court's position by this Court in that case.

At this juncture it should be noted that the legality or illegality of, or conduct surrounding the execution and/or demand for, union security agreements—the subject matter of the complaint in this action—is

clearly regulated by the provisions of the Act. Section 8(a) (3) of the Act provides in part:

> "That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . ."

In other words, the sole subject matter of the complaint in this matter is clearly regulated by the provisions of the Act and there is no doubt that it is *fairly* within the "protected or prohibited" provisions of the Act.

In subsequent discussion, the dissenters of the California Supreme Court characterized the decision of the majority in the following language:

> "One searches the California statutes relied upon by the majority opinions in vain for a hint of the new law of labor-management relations set forth to date. Either the proscriptions of employer interference in sections 923 and 1122 [California Labor Code] preclude closed or union shop contracts or they do not. Neither section affords any support for the conclusion that they are sometimes lawful and sometimes not, depending upon the wishes of the majority of the employees directly involved. *The requirement of majority rule has been lifted from section 8 (a) (3) (i) of*

the Federal Labor Management Relations Act. 29 U.S.C., secs. 158, 159. Such borrowing is obviously a legislative function. Moreover, the administrative machinery that is not only basic to the operation of the federal act but necessary to make section 8(a) (3) (i) effective and workable is not so easily come by. The majority opinion . . . suggests that employers and union may cooperate in conducting free elections, and so I suppose they may. But who is to determine the appropriate bargaining unit or conduct an election when the parties disagree or refuse to cooperate? (See sections 8 (a) (3) (i), 9 (b); 29 U.S.C. sections 158, 159.). These difficulties, of course, only emphasize the impropriety of usurping the legislative function." (52 A.C. 2d 232, 247, emphasis added).

It becomes obvious, as pointed out by the dissenters, that the majority of the California Supreme Court persists in *their* application of federal law and federal doctrines with respect to labor-management relations despite the reversals by this Court of their previous attempts to accomplish the same result in both *Garmon* decisions, *supra*, and in the *Seven Up* case, *supra*.

As noted, the most recent pronouncements of this Court with respect to the scope of federal preemption under the Act, leave no room for doubt that in a situation such as is involved here, federal judicial and administrative agencies have exclusive and primary jurisdiction as to the subject matter of this action and to determine whether the provisions of the Act

have preempted state Courts from acting as to a particular dispute. In its second *Garmon* decision, *supra*, this Court again made it clear that whether the relief sought was equitable or legal, the federal judicial and administrative agencies are vested with primary jurisdiction to determine whether a particular dispute affects interstate commerce within the meaning of the Act—a determination from which state Court have been preempted.

The admission of plaintiffs in their answer to the cross-complaint is an additional factor to be considered. Petitioners do not base their contentions with respect to federal preemption solely upon the admission but merely point it out as an admission of the complaining parties, that they are engaged in a business which affects interstate commerce. Yet, despite this admission for purposes of the answer to the cross-complaint, plaintiffs then take the position, and are supported by the majority of the California Supreme Court, that they are not engaged in a business affecting interstate commerce with respect to the other aspects of the case, at least, until a determination to that effect, under a *continuing* preliminary injunction, is made by the trial Court.

The majority of the California Supreme Court takes the further position that plaintiffs are not bound by such an allegation and admission because it is merely a conclusion of law. However, the majority ignores the fact that such an admission admits the *facts* which frame the jurisdictional question. Thus, the majority

would permit the pleader to allege and admit facts of jurisdiction but escape the consequences of such an allegation or admission at a later time.

There is no doubt that if state courts were permitted to assert jurisdiction to determine the primary federal jurisdictional question and to issue injunctive relief pending the determination of such issues, the basic purpose of section 10(a) of the Act, as well as the decisions of this Court, cited above, which construe the effect of that section, would be violated and ignored.

As late as May 4, 1959, this Court, in the *Seven Up* case, *supra,* reversed the majority of the California Supreme Court on the issue of whether or not the proceedings should be returned to the trial Court for a finding of whether or not the business of the employer affects interstate commerce within the meaning of the Act. Nevertheless, the majority of that Court persists in adhering to its position despite the decisions and reversals rendered by this Court. We do not question the reasons or motives underlying the refusal of the majority of the California Supreme Court to recognize the decisions of this Court but suffice it to say that the *Seven Up* case, *supra,* was reversed on precisely the same issue as is involved here and is clearly applicable and would compel a reversal of the decision of the majority of the California Supreme Court in this case with respect to the issue of preemption under the Act and jurisdiction of State courts to determine whether or not such preemption exists.

The applicability of federal law regulating labor-management relations to the controversy involved here was completely settled by the decision of this Court in the recent *Garmon* case, *supra*, wherein it was stated:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by section VII of the Taft-Hartley Act, or constitute an unfair labor practice under section VIII, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than law specifically directed toward the governance of industrial relations. *Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.*" (79 S. Ct. 779, emphasis added.)

II.

THE MAJORITY, IN ATTEMPTING TO UPHOLD THE ISSUANCE OF THE PRELIMINARY INJUNCTION, IMPROPERLY EXPANDS ITS SCOPE.

Petitioners are not questioning the interpretation of the California Supreme Court with respect to the validity or the invalidity of Trinity County Ordinance

No. 228, which was the basis for the complaint in this action. However, it should be pointed out that the majority, in endeavoring to uphold the propriety of the issuance by state Courts of preliminary injunctions and in its attempt to avoid the decisions of this Court with respect to the application of federal jurisdiction ignored the fact that the injunction was tailored and made applicable solely to the violation of the local ordinance and was not directly or indirectly based upon violations of state laws dealing with labor-management relations.

As noted previously, the majority holds that the portion of the preliminary injunction which restrains violations of Ordinance No. 228 and ties the restraint *solely* to such violations should be ignored and that the general language of the injunction and, accordingly, the general jurisdiction of state Courts should remain.

Thus, the majority completely changes the scope of the injunction of the issuing trial Court without any advance knowledge or notice to petitioners in this regard. Certainly, it cannot be doubted that such action is violative of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
July 20, 1959.

Respectfully submitted,

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(Appendices Follow.)

Appendix A

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In the Superior Court of the State of California
in and for the County of Trinity

No. 3631

Cornelius A. Hood, Alta R. Hood, Guy McTimmonds, and Patricia L. McTimmonds, individually and as co-partners, doing business as the H & M Super Market, a partnership,
Plaintiffs,

vs.

Retail Clerks' Union, Local No. 1364, AFL-CIO, an unincorporated association; Butchers Union, Local No. 352 of the Amalgamated Meat-Cutters and Butcher Workmen of North America, AFL-CIO, an unincorporated association; Five Counties Central Labor Council, an unincorporated association; Hartley L. Weingartner; Harry McNinch; Robert Giesick; First Doe; Second Doe; Third Doe; White Association; Black Association; White Corporation; Black Corporation,
Defendants.

ORDER FOR PRELIMINARY INJUNCTION AND PRELIMINARY INJUNCTION

This matter having come on for hearing before the above entitled Court on October 4, 1957 upon an Order to Show Cause why a temporary injunction should not be granted, said order having been duly issued by this Court on September 18, 1957, plaintiffs appearing at said hearing by and through their attorneys, Severson, Davis & Larson, Nathan R. Berke and George Brunn, and all defendants named in the verified complaint on file herein appearing by and through their attorneys, Charles P. Scully by Victor Van Bourg, and Halpin & Halpin by Jack Halpin, and oral testimony having been taken, oral argument had, and written briefs having been submitted on behalf of the parties hereto, and the Court having been fully advised in the premises, the Court now finds as follows:

1. All named defendants have appeared in this action.

2. Plaintiffs, doing business as H & M Super Market, a partnership, at all times material hereto have been and are now engaged in the business of conducting a retail food and grocery market within the County of Trinity, State of California.

3. At all times hereinafter mentioned, defendant labor organizations were and are unincorporated associations and at all such times the individual named defendants were and are representatives and organizers of the defendant labor organizations.

4. The headquarters of said defendant organizations are not located in Trinity County and their said representatives and organizers are not residents of

Trinity County but defendants claim that they have members living and working in Trinity County.

5. At various times during the months of June, July, and August, 1957, in Trinity County, California, defendants made demand on plaintiffs for recognition of the defendant labor organizations as the collective bargaining agents of plaintiff's employees, and further demanded that plaintiffs enter into written collective bargaining agreements with defendant labor organizations.

6. Each said proposed collective bargaining agreement contained a union shop clause which would require plaintiffs' employees to become, and as a condition of retaining and continuing employment to remain members of said defendant labor organizations, or to suffer termination of their employment with plaintiffs.

7. Most of the employees of plaintiffs are not members of the defendant labor organizations and the employees of plaintiffs have not at any time demanded from plaintiffs a union shop or union recognition, nor have such employees participated at any time in the negotiations for collective bargaining agreements, nor have the employees of plaintiffs designated the defendants or any of them as their representatives for collective bargaining.

8. Plaintiffs refused the demands of defendants and refused to execute said agreements.

9. During the period of negotiation referred to above, defendants threatened plaintiffs with economic sanctions if plaintiffs did not enter into the aforesaid collective bargaining agreements containing union

shop provisions demanded by defendants and following plaintiffs' said refusal, on or about August 9, 1957, a picket was placed in front of the plaintiffs' market by defendants and picketing by defendants has continued at all times during marketing hours and still continues to the present time.

10. The purpose and intent of defendants, and each of them, in commencing and continuing said picketing is

(a) to coerce and induce plaintiffs to accept the aforesaid demands, and each of them, of defendants;

(b) To force and induce plaintiffs to deny their employees the opportunity to retain employment because of non-membership in the defendant labor organizations;

(c) To force and induce plaintiffs to employ and retain as employees only persons who become members of the defendant labor organizations.

11. Commencing on September 18, 1957, and at all times thereafter, there has been and now is in effect within the County of Trinity, State of California, Ordinance No. 228, duly enacted by the Board of Supervisors of the County of Trinity. A copy of said ordinance is attached to defendants' Memorandum of Points and Authorities on file herein and it has been stipulated by all parties that said copy fully and correctly sets forth the provisions of said ordinance. A full true and correct copy of said ordinance is also attached to the Opinion rendered by this Court, dated October 15, 1957, on file herein.

12. Trinity County Ordinance No. 228 is valid and constitutional.

13. The acts and conduct of the defendants, including the picketing conducted by them, are for an illegal purpose in violation of said ordinance.

14. By reason of said unlawful picketing by defendants herein, plaintiffs have been and continue to be prevented from conducting their normal business activities; unless a preliminary injunction is issued in this matter, great and irreparable damage will result to plaintiffs and monetary damages are not and will not be sufficient to compensate plaintiffs for the loss and injury caused by said picketing and for the loss and injuries which will occur in the future, if such picketing is allowed to continue; plaintiffs do not have a plain, adequate or speedy remedy at law; unless picketing is enjoined during the pendency of this action, said injuries to plaintiffs will continue.

It appears from the foregoing that a preliminary injunction should be granted in this matter and it is therefore Ordered, Adjudged and Decreed that each of said defendants, Retail Clerks' Union, Local No. 1364, AFL-CIO; Butchers Union, Local No. 352 of the Amalgamated Meat-Cutters and Butcher Workmen of North America; Five Counties Central Labor Council; Hartley L. Weingartner, Harry McNinch; and Robert Giesick, and their officers, agents, servants, representatives, employees, organizers, members, Confederates, and attorneys, and each and every and all persons acting at the direction of or in concert with said defendants, or any of them, be and they are hereby enjoined during the pendency of this action

and until the further order of this Court from engaging in any picketing, boycott, strike, or threats for the purpose of forcing and inducing plaintiffs to make an agreement requiring plaintiffs' employees to become or remain members of defendants Retail Clerks Union, Local No. 1364, AFL-CIO or Butchers Union, Local No. 352 of the Amalgamated Meat-Cutters and Butcher Workmen of North America, AFL-CIO or any other labor organization, in order to obtain, retain or continue in employment with plaintiffs which in any way is in violation of Ordinance No. 228 of the County of Trinity, which became effective on September 18, 1957.

It Is Further Ordered, Adjudged and Decreed that a preliminary injunction be issued as hereinabove set forth, upon plaintiffs' filing a bond in the sum of $500.00.

Dated, October 28, 1957.

C. A. Paulsen,
Judge of the Superior Court.

The foregoing is a correct copy of the original instrument on file in this office. A.D. October 28, 1957.

MARGARET BAILEY,
County Clerk and Ex-Officio Clerk of the Superior Court of the County of Trinity, State of California.
Peggy Mortensen,
Deputy.

Filed Oct. 28, 1957,
Margaret Bailey, Clerk,
By Peggy Mortensen,
Deputy Clerk.

Appendix B

In the Superior Court of the State of California
in and for the County of Trinity

No. 3631

Cornelius A. Hood, et al,	Plaintiffs,
vs.	
Retail Clerk's Union Local No. 1364, et al,	Defendants.

ORDER DENYING MOTION TO DISMISS

Defendants' motion to dismiss for lack of jurisdiction is ordered denied.

This is a question that can be raised again at any stage of the proceedings, and it appears from the pleadings and briefs that a factual question underlies this problem. The case was set for trial at 10 a.m., March 25, 1958. Under the circumstances it is ordered that the hearing at that time be limited to the trial of facts going to the question of jurisdiction and arguments on the law on that point. If the Court then finds that it lacks jurisdiction, the case will be dismissed. If it finds that it has jurisdiction on the facts as then developed, it will set a time for hearing on the question of injunctive relief and on the question of damages.

Dated, February 25, 1958.

C. A. Paulsen,
Judge of the Supreior Court.

Filed February 25, 1958.
Margaret Bailey, Clerk,
By Peggy Mortensen,
Deputy Clerk.

Appendix C

In the District Court of Appeal
State of California
Third Appellate District

3 Civil No. 9475

Retail Clerks' Union, Local No. 1364, AFL-CIO, etc., et al,

vs.

Superior Court of the State of California, etc., et al.

By the Court:

The petition for a writ of prohibition is denied.

Dated, March 27, 1958.

Van Dyke,
Presiding Justice.

(No opinion filed.)

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(Endorsed) Filed Mar. 27, 1958,
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Appendix D

(Vol. 52 A.C. 232.)

In the Supreme Court of the State of California

In Bank

Sac. No. 6938

RETAIL CLERKS UNION, LOCAL No. 1364, AFL-CIO, an unincorporated association; BUTCHERS UNION, LOCAL No. 352 OF THE AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, an unincorporated association; FIVE COUNTIES CENTRAL LABOR COUNCIL, an unincorporated association; HARTLY L. WEINGARTNER; HARRY McNINCH and ROBERT GIESICK,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF TRINITY, CORNELIUS A. HOOD, ALTA R. HOOD, GUY McTIMMONDS, and PATRICIA L. McTIMMONDS, individually and as co-partners, doing business as the H & M Super Market, a partnership,

Respondents.

OPINION

Petitioners (labor unions and organizers) seek a writ of prohibition (with mandatory as well as prohibitory effect) to compel respondent superior court of Trinity County (1) to desist from further proceedings in an action (hereinafter sometimes referred to as the basic or superior court action) brought against

petitioners by the other respondents (employers who operate a retail market), (2) to dissolve an "order for preliminary injunction and preliminary injunction" entered in such basic action, and (3) to grant petitioners' "motions to dismiss and vacate any judgment, order for preliminary injunction and preliminary injunction" entered in that action.

The complaint in the subject basic action alleges that defendants (petitioners here) are interfering with plaintiffs' business by picketing to compel plaintiffs to execute collective bargaining agreements with the demanding unions; that the unions are not authorized to represent, or to negotiate for, any of plaintiffs' employes; but that the agreements contain a provision that plaintiffs will require their employes to become and remain members of the unauthorized unions (and thereby choose and designate such unions as their bargaining representatives) as a condition of retaining their employment. Plaintiffs in the basic action seek injunctive relief and ask leave to amend to set forth damages when the amount of such damages becomes ascertainable. The complaint alleges the enactment of a county "right-to-work" ordinance which by its terms became effective on the date of the filing of the complaint. The provisions of the ordinance (No. 228) are in all material respects, including the definition of "labor organization" in section 1, identical with the provisions of the San Benito County ordinance quoted and summarized in *Chavez v. Sargent, ante,* *p. ..... [..... P.2d .....], footnote 1. The

*Advance Report Citation: 52 A.C., p. 185 et seq.

facts in this case, however, are antithetical to those in Chavez. There all three interested entities—employer, employes (the majority of them), and the subject union—want to execute a union shop agreement. Here, neither employers nor employes want a contract with or membership in the demanding unions. The unions, nevertheless, seek by the pressures of picketing to induce the employers to compel their employes to join such unwanted unions and constitute them their bargaining agents.

Petitioners attack the validity of the ordinance on various grounds; also they urge that exclusive jurisdiction of this controversy is in the National Labor Relations Board and the federal courts. We have concluded that the record does not establish that exclusive jurisdiction is in the federal board and courts; that the ordinance is invalid for the reasons explained in *Chavez v. Sargent, ante,* *p. ..... [..... P.2d .....]; but that since the subject superior court action seeks relief which conceivably can be afforded under the same state law which renders the ordinance void, the proceedings therein can continue on both the complaint and the defendants' cross-complaint.

The preliminary injunction attacked by petitioners restrains them from "picketing, boycott, strike, or threats" for the purpose of inducing plaintiffs-employers to make an agreement that they will require their employes to become or remain members of any labor organization as a condition of employment, in

*Advance Report Citation: 52 A.C., p. 174.

violation of Ordinance Number 228. In support of this injunction the court found, among other things, that "Most of the employees of plaintiffs are not members of the defendant labor organizations and the employees of plaintiffs have not at any time demanded from plaintiffs a union shop or union recognition, *nor have such employees participated at any time in the negotiations for collective bargaining agreements, nor have the employees of plaintiffs designated the defendants or any of them as their representatives for collective bargaining.*" (Italics added.) All of the italicized portion of the quoted finding is material but, as explained in the Chavez case, *ante,* *p. ..... [..... P.2d .....] that which is of paramount importance in bringing this case within the control of the statutes which declare the overriding state policy and which must govern disposition of this litigation (Lab. Code, §§ 920-923, 1115-1122, 1126, quoted in *Chavez v. Sargent, ante,* footnotes 6 through 8) is the fact that plaintiffs' employes have not chosen or designated petitioners as their representatives.

The answer of petitioner (as defendants in the basic action) alleges "That the court has no jurisdiction of the subject matter of this action . . . in this, that the exclusive jurisdiction thereof lies with the judicial and administrative agencies of the United States." Petitioners also cross-complained, alleging that plaintiffs coerced their employes "to prevent the exercise of their right to full freedom of association, self-organization and designation of representatives of their own

*Advance Report Citation: 52 A.C., p. 174.

choosing." Plaintiffs' answer to the cross-complaint alleges "that the Court has no jurisdiction of the subject matter of the cross-complaint . . . in that the exclusive jurisdiction thereof lies with the National Labor Relations Board."

Petitioners urge that by the above quoted allegation of the answer they have alleged, and by the above quoted averment of the answer to the cross-complaint plaintiffs have admitted, that the plaintiffs' business affects interstate commerce within the meaning of the federal Labor Management Relations Act of 1947, as amended (the Taft-Hartley Act, 29 U.S.C.A. § 141 et seq.); that under the national act the state court has no jurisdiction to grant relief on account of the conduct here in question; and that therefore (as in *Calise v. Superior Court* (1958), 159 Cal.App.2d 126, 133, 135 [3] [323 P.2d 859]) prohibition should issue. We are not prepared to hold that the allegations of bare conclusions of law as to jurisdiction establish any facts as to the effect of any alleged labor practice upon interstate commerce (see *Brown v. Aguilar* (1927), 202 Cal. 143, 149 [259 P. 735]; *Kidwell v. Ketler* (1905), 146 Cal. 12, 17, 18 [79 P. 514] [pleader is not bound by allegation or admission of conclusion of law]; *Faulkner v. California Toll Bridge Authority* (1953), 40 Cal.2d 317, 329 [9], 330 [12] [253 P.2d 659] [conclusions of law are not admitted by demurrer]; *Wheeler v. Oppenheimer* (1956), 140 Cal.App. 2d 497, 501 [3] [295 P.2d 128] [conclusion of law "tendered no issue"]); rather, we agree with the superior court that in the present state of the record

there is an unresolved "factual question" (in addition to questions of law) upon which determination of its jurisdiction may eventually depend. At the present time the allegations as to jurisdiction show at most that upon further proceedings in the basic action questions of federal preemption *may* be presented: but they show also that no such issue is ripe for resolution in this proceeding.

Here, as in the Chavez case, *ante,* *p. ..... [..... P.2d .....] the ordinance contravenes the state-wide statutory policy as to the freedom of employes to organize, select representatives, and through them bargain collectively for the traditional objectives of organized labor, subject only to such regulations and proscriptions as are set forth in the statutes or otherwise imposed by law (Lab. Code, §§ 920-923, 1115-1122, 1126; see by way of examples of "regulations and proscriptions . . . otherwise imposed," the decisional law of *James v. Marinship Corp.* (1944), 25 Cal.2d 721 [155 P.2d 329, 160 A.L.R. 900]; *Hughes v. Superior Court* (1948), 32 Cal.2d 850 [198 P.2d 885]; affirmed *Hughes v. Superior Court* (1950), 339 U.S. 460 [70 S.Ct. 718, 94 L.Ed. 985]); likewise, the ordinance partially duplicates state-wide statutory policy insofar as it prohibits jurisdiction-organizational assaults on established employe-employer relationships; and its conflict with general law cannot be eliminated by mechanical separation of its language. The basic superior court action, therefore, cannot continue insofar as it seeks relief under the ordinance.

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*Advance Report Citation: 52 A.C., p. 174.

The subject action, however, can continue both on the complaint and on the cross-complaint in respect to any relevant relief which is not, on the facts, precluded by federal law and which is provided under state law as declared in sections 921 through 923, sections 1115 through 1122, and section 1126 of the Labor Code. (*Chavez v. Sargent, ante,* *p. ..... [..... P.2d .....].) If it develops that plaintiffs' business does not affect interstate commerce within the meaning of the Labor Management Relations Act of 1947, and that defendants are picketing to compel plaintiffs (the employers) to violate state law by coercing their employes to designate the defendants as their exclusive bargaining representatives, and to accept terms and conditions of employment dictated by defendants, without authorization by plaintiffs' employes, then plaintiffs may be entitled to both injunctive relief and damages. If it develops that the subject dispute interferes with the flow of interstate commerce (see the Taft-Hartley declaration of policy and purpose, 29 U.S.C.A. § 141), then the alleged conduct of defendants, tortious but peaceful within the federal concept, cannot be restrained or redressed by the state. This conclusion follows because no facts are alleged or found which tend to exclude plaintiffs from the class segregated by the federal authority[1] for nonaccess to the courts (*San Diego Unions v. Garmon* (1959), 27

*Advance Report Citation: 52 A.C., p. 174.

[1]The National Labor Relations Board, according to its present self-imposed limitation of jurisdiction, will not act in cases of alleged unfair labor practices where the employer is a retailer with a gross annual business of less than $500,000.

LW 4268; *San Diego Bldg. Trades Council v. Garmon* (1957), 353 U.S. 26 [77 S.Ct. 607, 609, 1 L.Ed.2d 618].)

The preliminary injunction enjoins "any picketing, boycott, strike, or threat for the purpose of forcing and inducing plaintiffs to make an agreement requiring plaintiffs' employees to become or remain members of . . . any . . . labor organization, in order to obtain, retain or continue in employment with plaintiffs *which in any way is in violation of Ordinance No. 228 of the County of Trinity, which became effective on September 18, 1957.*" (Italics added.) The unitalicized portion of the preliminary injunction is proper, for it enjoins conduct which under the circumstances found is tortious under the above referred to sections of the Labor Code and which has not been shown to affect interstate commerce so as to bring it within the purview of the national act. The emphasized portion of the preliminary injunction, characterizing the enjoined conduct as violative of the invalid ordinance, is mere descriptive surplusage, utterly void in any application.

For the reasons above stated, the alternative writ is discharged and the peremptory writ is denied.

Schauer, J.

Shenk, J., and Spence, J., concurred.

McCOMB, J.—I concur in the judgment and opinion, for the reasons expressed in my concurring opinion in *Chavez v. Sargent, ante* *p. ..... [..... P.2d .....].

*Advance Report Citation: 52 A.C., p. 227.

TRAYNOR, J., Concurring and Dissenting.—I concur in the judgment insofar as it determines that the Trinity County ordinance is invalid. It is my opinion, however, that the finding relied upon by the majority opinion does not establish that petitioners' objective was unlawful under state law and that the preliminary injunction is therefore without support in the record.

Petitioners, certain unions and their officers seeking to organize plaintiffs' Super Market employees, commenced picketing the market to induce plaintiffs to execute union shop agreements. Plaintiffs' employees had not selected the unions as their bargaining agents, and it does not appear that they wish to be organized or to work under a union shop agreement. The majority opinion holds that picketing or other concerted activities by the unions to secure union shop agreements is therefore unlawful under state law. In the companion case of *Chavez v. Sargent, ante* p. ..... [..... P.2d .....], the majority opinion holds that a union or closed shop agreement is lawful if a majority of the employees wish it and that in such a case picketing or other peaceful concerted activity to secure a union or closed shop is likewise lawful.

This is new law in this state. The majority opinions purport to find it in sections 920-923, 1115-1120, 1122, and 1126 of the Labor Code. Since sections 920-923 had been interpreted to permit conduct now found to

*Advance Report Citation: 52 A.C., p. 174.

be proscribed, the majority opinions invoke the later-enacted Jurisdictional Strike Act (Lab. Code, §§ 1115-1120) and Labor Code, section 1122, to support their conclusion that organizational activity carried on without the support of or against the wishes of a majority of the employees involved is unlawful. The Jurisdictional Strike Act, however, deals only with disputes between two or more labor organizations, and accordingly, to make its provisions relevant to a dispute between organized and unorganized labor, the majority opinions are driven to create a fictitious labor organization consisting of the unorganized employees and then pitting that unorganized "organization" against the unions.

The Jurisdictional Strike Act says nothing whatever about the new test of legality now adopted. To avoid the prohibition of organizational activities by a majority of the employees against a dissident unorganized minority under the new construction of that act the majority opinions judicially amend it to permit jurisdictional strikes carried on by unions representing a majority of the employees involved. Such amendment is a flagrant usurpation of legislative power.

Furthermore, neither section 1122 nor 1126 supports the new rules created by the majority opinions. Section 1122, like section 923, proscribes employer interference with labor organizations. Far from indicating a legislative repudiation of the settled judicial interpretation of section 923 when section 1122 was enacted, it constitutes a legislative adoption of that in-

terpretation. Section 1126 merely provides for the enforcement of collective bargaining agreements. It is silent as to the validity of closed or union shop provisions in such agreements or the legality of concerted activity undertaken to secure them.

Before the decision of this court in *Garmon v. San Diego Bldg. Trades Council*, 49 Cal.2d 595 [320 P.2d 473], it was settled that a closed or union shop is a proper objective of concerted labor activity, since it is reasonably related to union welfare and the betterment of working conditions whether or not any or a majority of the employees belong to the union or wish to bargain collectively. (*J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581 [98 P. 1027, 16 Ann. Cas. 1165, 21 L.R.A. N.S. 550]; *McKay v. Retail Auto. S. L. Union No. 1067*, 16 Cal.2d 311, 315-325 [106 P.2d 373]; *C. S. Smith Met. Market Co. v. Lyons*, 16 Cal.2d 389, 401 [106 P.2d 414]; *Magill Bros. v. Building Service etc. Union*, 20 Cal.2d 506, 508 [127 P.2d 542]; *James v. Marinship Corp.*, 25 Cal.2d 721, 730 [155 P.2d 329, 160 A.L.R. 900]; *Park & T. I. Corp. v. International etc. of Teamsters*, 27 Cal.2d 599, 604 [165 P.2d 891, 162 A.L.R. 1426]; *Charles H. Benton, Inc. v. Painters Local Union*, 45 Cal.2d 677, 681 [291 P.2d 13].) The reasons for permitting picketing to compel a closed or union shop, even when none of the employees belong to the picketing union, were articulated in *C. S. Smith Met. Market Co. v. Lyons*, 16 Cal. 2d 389, 401 [106 P.2d 414]: "The members of a labor organization may have a substantial interest in the employment relations of an employer although none

of them is or ever has been employed by him. The reason for this is that the employment relations of every employer affect the working conditions and bargaining power of employees throughout the industry in which he competes. Hence, where union and nonunion employees are engaged in a similar occupation and their respective employers are engaged in trade competition one with another, the efforts of the union to extend its membership to the employments in which it has no foothold is not an unreasonable aim." (See also Schauer, J. dissenting in *Bautista v. Jones*, 25 Cal.2d 746, 767, 783 [155 P.2d 343].)

In the Garmon case, by reinterpreting section 923 of the Labor Code and invoking the Jurisdictional Strike Act, the court held that a union shop contract is an unlawful objective under state law when none of the employees wish to join or be represented by the union. The court concluded that by signing a union shop agreement the employer would interfere with his employees' rights "in the designation of . . . representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (Lab. Code, § 923) in violation of section 923. As I pointed out in my dissent in the Garmon case, the court in effect overruled a settled rule of decision to the contrary and in particular *Shafer v. Registered Pharmacists Union*, 16 Cal.2d 379, 383-388 [106 P.2d 403], which expressly held that sections 920-923 of the Labor Code do not restrict the right of labor to engage in concerted activity to attain a closed or union shop.

The Garmon case dealt with a business that affected interstate commerce and was reversed on the question of federal preemption in *San Diego Building Trades Council v. Garmon*, ___ U.S. ___ [79 S.Ct. 773, 3 L.Ed. 2d 775]. Moreover, it was decided on an erroneous assumption that the conduct found tortious under state law was also illegal under federal law. As the United States Supreme Court pointed out, however, it was by no means clear that the conduct involved violated federal law. In fact, it may have been protected by that law. (See Labor Management Relations Act, §§ 7, 8(b), 29 U.S.C. §§ 157, 158 (b).) If, despite these weaknesses in this court's Garmon decision, the majority opinions in the present cases adhered to it on the question of the illegality of union or closed shop contracts and concerted activity to achieve them under state law, it would be necessary to determine if that case controls the present ones. In my opinion, however, there is no basis whatsoever in the statutory law of this state for distinguishing between a closed or union shop agreement sought by a union representing a majority of the employees and such an agreement sought by a union representing none or only a minority of the employees. By agreeing to hire only union members or to require new employees to join the union, the employer in either case assists the union in controlling the labor market and thereby enables it to recruit and retain members. It makes no difference to the nonunion employee who wishes to remain unorganized whether he is compelled to accede to the wishes of a majority of his fellow employees in the same shop or to the pressure of a union seeking to organize a shop in which it has not

yet gained a foothold. If the employer accedes to the demand for a closed or union shop in either case, he interferes with the right of unorganized employees to remain unorganized. Such interference was not proscribed before the Garmon case, for it was merely incidental to the union's pursuit of a proper objective. Section 923 does not provide that a closed or union shop is a lawful objective when the union has a majority but an unlawful objective when it does not. It does not make the legality of concerted union activity turn on the extent of the success the union has already achieved in the particular shop it seeks to organize. Accordingly, if as the Garmon case held, it is unlawful employer interference to make a union or closed shop agreement with a union that does not represent a majority of the employees, it is also such interference to make such an agreement with a union that does. By distinguishing between these two situations the majority opinions in the present cases at least in part repudiate the Garmon decision, and it is significant that they now point out that "our conclusions in the present case . . . are independent of, and do not rest on, our second Garmon decision, *supra*, 49 Cal.2d 595." (*Chavez v. Sargent, ante* *pp. ....., ... [..... P.2d .....].) For these reasons the Garmon case does not control the present cases.

The majority opinions hold that a closed or union shop agreement and concerted activity to achieve it are lawful, but only if a majority of the employees

*Advance Report Citation: 52 A.C., pp. 218, 222.

to be covered by the agreement wish it. Such a limitation is admittedly contrary to the law as it was understood before the enactment of the Jurisdictional Strike Act in 1947. Moreover, it finds no support whatever in that act as a reading of its provisions makes abundantly clear. In *Seven Up etc. Co. v. Grocery etc. Union*, 40 Cal.2d 368, 381 [254 P.2d 544, 33 A.L.R.2d 327], we sustained the constitutionality of the act and summarized its effect as follows: "Wisely or unwisely the Legislature has declared the policy of this state that an employer's business shall not be interfered with or the public welfare disrupted by reason of an argument between two or more unions as to which shall be chosen to represent his employees. . . . The act eliminates the situation where the labor organization is employer controlled; hence *an independent union is not prevented from endeavoring to organize an employer's employees when they belong to an employer controlled union or no union.*" (Italics added.) We are now told, however, that organizational pressure is "essentially a jurisdictional dispute pressure," and that "any group of employes, organized or unorganized in the formal, conventional sense, who were free of the proscribed employer influence and who determined and informed their employer through their authorized spokesman that they were unwilling to accede to the demands of an organizer or unwanted union, and that they were satisfied with the terms and conditions of their employment and wished to continue in the established employe-employer relationship, would thereby act as and constitute a 'labor organization' within the meaning of sections 1117 and

1118." *(Chavez v. Sargent, ante,* *pp. ....., ..., ... [..... P.2d .....].)

To constitute a labor organization, sections 1117 and 1118 of the Labor Code require more than an agreement not to be organized. Such an organization must exist for the purpose "of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work." (Lab. Code, § 1117.) A group whose sole purpose is to express the wish of its members not to deal as a group with the employer "concerning grievances, labor disputes, wages, hours of employment or conditions of work" is obviously not an organization that exists for the purposes stated in section 1117. It is a contradiction in terms to hold that a group whose purpose is *not* to bargain is nevertheless a bargaining agent. But even if such a group could be a labor organization under section 1117, its objection to organization of the shop could not give rise to a jurisdictional strike within the meaning of section 1118. Such a strike can only arise out of a "controversy between two or more labor organizations as to which of them has or should have the exclusive right to bargain collectively with an employer . . . [or] the exclusive right to have its members perform work for an employer." (Lab. Code, § 1118.) The wish of all or some of the employees to work in an open shop without collective bargaining is the very antithesis of a demand for the "exclusive right to bargain collectively" or for the "exclusive

*Advance Report Citation: 52 A.C., pp. 198, 203, 208.

right to have [their] members perform work for [the] employer."

Even if a dispute with the fictitious organization created by the majority opinion in the Chavez case could give rise to a jurisdictional strike, there is no such dispute here. The trial court did not find that the employees had an "authorized spokesman" who informed the employer "that they were unwilling to accede to the demands of an organizer or unwanted union, and that they were satisfied with the terms and conditions of their employment and wished to continue in the established employe-employer relationship." (*Chavez v. Sargent, ante,* *pp. ....., ... [..... P.2d .....].) It found only that "Most of the employees of plaintiffs are not members of the defendant labor organization and the employees of plaintiffs have not at any time demanded from plaintiffs a union shop or union recognition, nor have such employees participated at any time in the negotiations for collective bargaining agreements, nor have the employees of plaintiffs designated the defendants or any of them as their representatives for collective bargaining." At most this finding simply shows that the employees were indifferent to the unions' efforts. It does not even suggest a common wish to retain the status quo. The burden of establishing the existence of a labor organization within the meaning of the Jurisdictional Strike Act is on the plaintiff seeking relief pursuant to its terms. (Lab. Code, § 1117.) It is obvious that plaintiffs did not meet this burden. They did not even

*Advance Report Citation: 52 A.C., pp. 206, 212.

attempt to do so, for the novel theory that the Jurisdictional Strike Act might be applicable to a dispute between a union and unorganized employees was yet to be suggested for the first time in the Garmon case.

The logic of the majority opinions' invocation of the Jurisdictional Strike Act would carry them far beyond where they profess willingness to go. The existence of an organization does not depend on the number of its members so long as there are more than one. Thus, if a majority of the employees in a shop are a labor organization because they wish to remain unorganized, so must be a minority that wish to remain unorganized. Any dispute between a union and the unorganized employees would result in a jurisdictional strike if the union engaged in concerted activity to advance its position. (Lab. Code, § 1118.) Under the reasoning of the majority opinions as few as two employees who did not wish to be organized would constitute a labor organization. If the terms of the act are to be thus distorted to make the unorganized organized, no concerted activity for collective bargaining is lawful unless the employees involved achieve substantial unanimity. As the majority opinions tacitly concede, no such absurd result was contemplated by the Legislature, and to avoid it, the majority opinions are driven to limit the application of the act to cases where the organizational activity is carried on by a union that does not represent a majority of the employees involved. The Jurisdictional Strike Act, however, does not provide for majority rule; majority rule is the creation of the

majority opinions. By its terms the act protects the employer from jurisdictional strife between labor organizations without regard to where the preference of a majority of his employees may lie. He is entitled to relief if he proves that a jurisdictional strike exists. He need not prove that the union engaged in the proscribed activity does not represent a majority. As now amended the act affords him much less protection, and it may come as a shock to employers who assumed that they were protected from true jurisdictional concerted activities conducted by powerful contending unions to learn that relief may be secured only against the union found to represent a minority or none of the employees.

The majority opinions' reliance on section 1122 of the Labor Code is equally illogical. That section provides that "Any person who organizes an employee group which is financed in whole or in part, interfered with, or dominated or controlled by the employer or any employer association, as well as such employer or employer association, shall be liable to suit by any person who is injured thereby. Said injured party shall recover the damages sustained by him and the costs of suit." We are told that "The proscription in this language extends not alone to the act of organizing an employee group *financed* by an employer but also to organizing any group of employes wherein the act of organizing such group, i.e., obtaining the consent of the employes to join in the organization, is either 'interfered with or dominated or controlled by the employer.' . . . For an employer to notify his employes that he has

agreed with a union which is, and which he knows to be, unauthorized and unwanted by his employees, that they must joint such union and be represented by it or be dismissed from employment would appear to constitute an unlawful interference by the employer and subject him to the liability imposed by section 1122." (*Chavez v. Sargent, ante,* *pp. ....., ... [..... P.2d .....].)

Section 1122 was added to the Labor Code in 1955 by the same act that amended section 1117 to put the burden on the plaintiff of establishing the existence of a labor organization. (Stats. 1955, ch. 1417, §§ 1-2.) Its obvious purpose is to prevent abuse of the Jurisdictional Strike Act by discouraging employers from organizing company unions to create the appearance of jurisdictional strikes when none in fact exist. It prohibits, not the execution of union or closed shop agreements with independent unions, but the organizing of an employer-interfered-with group. Moreover, if it did constitute employer interference within the meaning of section 1122 to execute a closed or union shop agreement with a union that does not represent a majority of the employees, it would likewise constitute such interference to execute such an agreement with a union representing a majority of them. Here, as in the case of the Jurisdictional Strike Act, however, the majority opinions shrink from the logic of their position and read into section 1122 language that is not there to permit what in their view would be employer interference but for the wish of a majority of

*Advance Report Citation: 52 A.C. pp. 215, 216.

the employees to have a closed or union shop agreement. Before the decision in the Garmon case it was settled that the proscription of employer interference in section 923 of the Labor Code did not outlaw closed or union shop agreements even though the employees did not wish them. Not only must the similar inhibitions of section 1122 be interpreted in accord with the established interpretation of section 923 at the time section 1122 was enacted, but the failure of the Legislature to amend section 923 when it enacted both the Jurisdictional Strike Act and section 1122 affords cogent evidence that it approved the existing interpretation of section 923. (See *People v. Nash*, *52 Cal.2d ___, ___ [___ P.2d ___]; *Cole v. Rush*, 45 Cal.2d 345, 355 [289 P.2d 450, 54 A.L.R.2d 1137]; *Buckley v. Chadwick*, 45 Cal.2d 183, 200 [288 P.2d 12, 289 P.2d 242].)

Thus, neither the Jurisdictional Strike Act nor section 1122 of the Labor Code supports a reinterpretation of section 923 to restrict the right of workmen to engage in concerted organizational activity. Before the Garmon decision such activities were fully protected as part of the individual workman's "full freedom of association, self-organization, and designation of representatives of his own choosing." (Lab. Code, § 923.) Of course the right of a union effectively to compete for employment on satisfactory terms for its members by seeking a closed or union shop interferes with the right of nonunion workmen to go it

*Advance Report Citation: 52 A.C., pp. 35, 45.

alone. Its recognition is not at war, however, as the majority opinions suggest, with either union democracy or majority rule unless the relevant majority is determined with myopic vision. A union that seeks control of available employment cannot arbitrarily close its ranks to qualified workmen or deny them full participation in its councils (*James v. Marinship Corp.*, 25 Cal.2d 721, 730-734 [155 P.2d 329, 160 A.L.R. 900]; *Thorman v. International Alliance etc. Employees*, 49 Cal.2d 629, 632 [320 P.2d 494]), and accordingly, democratic representation must be afforded to those the union claims the right to represent. Moreover, by approving the legality of a closed or union shop when a majority of the workmen directly involved wish it, the majority opinions recognize that the right to remain unorganized is subject to legitimate group interests and pressures. By looking only to the workmen immediately involved, however, the majority opinions blind themselves to the essential interrelation of working conditions in competitive businesses and choose as the relevant group whose majority may govern, not all of the workmen with interests in common, but only a small fraction of them. It is true that we have no mechanism for determining whether a majority of all workmen with common interests do or do not wish collective bargaining through unions in which they may freely participate, but if each workman the union seeks to represent is protected in his right to participate in union affairs, the danger of a minority thrusting itself on an unwilling majority in the labor market would be remote. Moreover, the "outcome of concerted activities for a

closed shop depends largely on public sentiment. No competitive business can indure indefinitely without good will; no group of workers can long define the terms of its employment without public support." *(Park & T. I. Corp. v. International, etc. of Teamsters,* 27 Cal.2d 599, 608 [165 P.2d 891, 162 A.L.R. 1426].)

One searches the California statutes relied upon by the majority opinions in vain for a hint of the new law of labor-management relations set forth today. Either the proscriptions of employer interference in sections 923 and 1122 preclude closed or union shop contracts or they do not. Neither section affords any support for the conclusion that they are sometimes lawful and sometimes not, depending on the wishes of a majority of the employees directly involved. The requirement of majority rule has been lifted from section 8 (a) (3) (i) of the federal Labor Management Relations Act. (29 U.S.C., §§ 158, 159.) Such borrowing is obviously a legislative function. Moreover, the administrative machinery that is not only basic to the operation of the federal act but necessary to make section 8 (a) (3) (i) effective and workable is not so easily come by. The majority opinion in the Chavez case suggests that employers and unions may cooperate in conducting free elections, and so I suppose they may. But who is to determine the appropriate bargaining unit or conduct an election when the parties disagree or refuse to cooperate? (See §§8(a) (3) (i); 9 (b); 29 U.S.C. §§ 158, 159.) These difficulties, of course, only emphasize the impropriety of

usurping the legislative function. If we are to have a little Labor Management Relations Act, it is for the Legislature, not this court to enact it.

I am convinced that union or closed shop agreements and concerted activities to achieve them are lawful under the law of this state whether or not a majority of the employees wish them. The majority opinions do not state that any of the cases so holding were wrongly decided, but apparently convinced that the time is now ripe for striking a new balance between the rights of organized and unorganized labor and employers, they seize upon the Jurisdictional Strike Act to achieve an objective foreign to its purpose. By enacting the Jurisdictional Strike Act the Legislature did not change or modify the policy set forth in section 923 insofar as purely organizational union activity is concerned. Only by amending that act by judicial fiat to provide for "majority rule" and applying it when it is obviously inapposite do the majority opinions achieve their aims. The conclusion is inescapable that in both method and result they have usurped legislative power.

Gibson, C. J., concurred.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 271

RETAIL CLERKS UNION, LOCAL No. 1364, AFL-CIO, an unincorporated association; BUTCHERS UNION, LOCAL No. 352 OF THE AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, an unincorporated association; FIVE COUNTIES CENTRAL LABOR COUNCIL, an unincorporated association; HARTLY L. WEINGARTNER; HARRY McNINCH and ROBERT GIESICK,
Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF TRINITY, CORNELIUS A. HOOD, ALTA R. HOOD, GUY McTIMMONDS, and PATRICIA L. McTIMMONDS, individually and as co-partners, doing business as the H & M Super Market, a partnership,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No.

RETAIL CLERKS UNION, LOCAL NO. 1364, AFL-CIO, an unincorporated association; BUTCHERS UNION, LOCAL NO. 352 OF THE AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, an unincorporated association; FIVE COUNTIES CENTRAL LABOR COUNCIL, an unincorporated association; HARTLY L. WEINGARTNER; HARRY McNINCH and ROBERT GIESICK,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF TRINITY, CORNELIUS A. HOOD, ALTA R. HOOD, LEVY McTIMMONDS, and PATRICIA L. McTIMMONDS, individually and as co-partners, doing business as the H & M Super Market, a partnership,

Respondents.

Brief in Opposition

This brief is filed on behalf of the individual respondents herein. They were plaintiffs in the basic action and will be referred to as plaintiffs here. Petitioners were defendants in the basic action and will be so referred to here.

Respondents pray that the petition for a writ of certiorari be denied for the reasons set forth below.

STATEMENT OF THE CASE

The statement of the case contained in the petition is incomplete in important respects and contains argumentative and conclusionary matter. Accordingly, we will supply a full statement.

A. Trial Court Proceedings

1. On August 18, 1957, plaintiffs (respondents here) filed a complaint in the Superior Court of the State of California in and for the County of Trinity. Its contents are accurately stated in the opinion of the California Supreme Court (Pet. App. D at x):

> "The complaint in the subject basic action alleges that defendants (petitioners here) are interfering with plaintiffs' business by picketing to compel plaintiffs to execute collective bargaining agreements with the demanding unions; that the unions are not authorized to represent, or to negotiate for, any of plaintiffs' employes; but that the agreements contain a provision that plaintiffs will require their employes to become and remain members of the unauthorized unions (and thereby choose and designate such unions as their bargaining representatives) as a condition of retaining their employment. Plaintiffs in the basic action seek injunctive relief and ask leave to amend to set forth damages when the amount of such damages becomes ascertainable. The complaint alleges the enactment of a county "right-to-work" ordinance which by its terms became effective on the date of the filing of the complaint.

2. On the same day the court issued an order to show cause why a temporary injunction against picketing should not be granted (Pet. App. A at ii).

3. On September 27, 1957, defendants (petitioners here) filed a demurrer and supporting memorandum. Inter alia, the demurrer challenged the court's jurisdiction on the ground that the Trinity County Ordinance was invalid as conflicting with the Labor Management Relations Act. This was the only federal question raised by the demurrer, as is made clear by the memorandum in support of the demurrer.

4. On October 4, 1957, a hearing was held by the court, at which evidence was introduced (Pet. App. A at ii). It is important to note at this point that defendants never made the record of this hearing a part of the subsequent prohibition proceedings. As a result the record contains only pleadings, briefs and orders. This is significant because *the record is wholly devoid of any facts bearing on the issue of whether plaintiffs' business affects interstate commerce.*

5. On October 15, 1957, the court overruled the demurrer and filed an opinion ruling that plaintiffs were entitled to a preliminary injunction.

6. On October 28, 1957, the court issued its Order for Preliminary Injunction and Preliminary Injunction, finding the facts set out in Appendix A to the Petition. Defendants (petitioners here) have not in any subsequent proceeding contested these facts and do not do so now.

7. Thereafter defendants filed an answer and cross-complaint and plaintiffs filed an answer to the cross-complaint. One of the defenses pleaded in the latter was that the National Labor Relations Board had exclusive jurisdiction over the subject matter of the cross-complaint. It is this defense that defendants characterize as an "admission" that plaintiff's business affects interstate commerce, although the California Supreme Court dealt with and rejected this contention as incorrect under California pleading rules (Pet. App. D at xii, xiii).

8. Subsequently defendants filed a motion to dismiss and to vacate the injunction. As defendants state (Pet. p. 6), this motion was based on the alleged "admission" by plaintiffs as to interstate commerce. The motion was denied on February 25, 1958. In the order denying the motion (Pet. App. B), the trial judge commented on the question of jurisdiction and noted that "a factual question underlies this problem." His order expressly provided for a "trial of facts going to the question of jurisdiction and arguments of law on that point. If the Court then finds that it lacks jurisdiction, the case will be dismissed. If it finds that it has jurisdiction on the facts as then developed, it will set a time for hearing on the question of injunctive relief and on the question of damages" (Pet. App. B.)

The trial as to the commerce facts never took place. Instead of proceeding to it, defendants chose to initiate the prohibition proceedings hereafter summarized.

B. Appellate Court Proceedings.

1. On March 7, 1958, defendants sought a writ of prohibition from the District Court of Appeal of the State of California, Third Appellate District. The application was denied without opinion.

2. Defendants next filed a petition for hearing by the California Supreme Court. The only federal question raised was the trial court's asserted lack of jurisdiction on the ground of the alleged "admission" as to interstate commerce and the further ground that "it is clear that the plaintiffs are engaged in a business affecting interstate commerce." (Petition for Hearing, pp. 17-18.) Other portions of the petition for hearing attacked the validity of the Trinity County Ordinance.

The Supreme Court of California granted the petition, issued an alternative writ and heard oral argument. It

then ruled in a written opinion (Pet App. D) (1) that the Trinity County ordinance was invalid as falling into a field occupied by state law; (2) that if "plaintiffs' business does not affect interstate commerce within the meaning of the Labor Management Relations Act of 1947" (Pet. App. xv), plaintiffs' allegations entitled them to relief under state law; (3) that in the present state of the record there was an unresolved factual question as to the effect of plaintiffs' business on commerce (*id.* at xiii, xiv); (4) that accordingly the federal preemption issue was not "ripe for resolution in this proceeding" (*id.* at xiv); and (5) there was no "admission" as to interstate commerce because the allegations as to commerce were conclusions of law and not binding on the pleaders (*id.* at xiii).

The court discharged the alternative writ, saying that the action "can continue both on the complaint and on the cross-complaint in respect to any relevant relief which is not, on the facts, precluded by federal law and which is provided under state law." (*id.* at xv.) The court explicitly recognized that "if it develops that the subject dispute interferes with the flow of interstate commerce * * *, then the alleged conduct of defendants * * * cannot be restrained or redressed by the state." (*Ibid.*)

3. Defendants filed a petition for rehearing, which was denied without opinion, and thereafter filed the pending petition for writ of certiorari.

REASONS FOR DENYING THE PETITION

We have summarized the record to date thus fully because it discloses three compelling reasons for denying the petition:

1. There has been no final decision by any California court as to jurisdiction. On the contrary, the California Supreme Court and the trial court both expressly held that

state jurisdiction depends on whether plaintiffs' business affects interstate commerce and that the facts as to that issue are yet to be ascertained.

2. No substantial federal question was raised or decided below and the decision rests entirely on state grounds.

3. California courts obviously have the jurisdiction and the responsibility to determine, subject to this Court's power of review, whether plaintiffs' business affects interstate commerce. This Court has always so held. No federal question meriting the attention of this Court is presented by the petition.

I.

THE DECISION BELOW IS NOT A FINAL JUDGMENT

A. The Rights of the Parties Have Not Been Fully Determined.

28 U.S.C. Section 1257 authorizes this Court to review "final judgments or decrees rendered by the highest court of a State in which a decision could be had, * * *"

The test for finality has been clearly stated by this Court. To be final a judgment must end the litigation by fully determining the rights of the parties. In *Gospel Army v. City of Los Angeles*, 331 U.S. 543, 546, 67 S. Ct. 1428, 1430, this Court said:

> "And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court except the ministerial act of entering the judgment which the appellate court * * * directed.' Department of Banking, *State of Nebraska, v. Pink*, 317 U.S. 264, 267, 63 S. Ct. 233, 235, 87 L. Ed 254."
>
> "Today 'the test is not whether under local rules of practice the judgment is denominated final * * * but rather whether the record shows that the order of the

appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court. * * *" *Department of Banking, State of Nebraska, v. Pink*, 317 U.S. at page 268, 63 S. Ct. at page 235, 87 L. Ed 254."

In that case the California Supreme Court had reversed an injunction. This Court held that the effect of the reversal was to permit the Gospel Army to amend its complaint and present new facts. Accordingly the judgment was not final and this Court unanimously dismissed the appeal.

Similarly, the Court has from its earliest days refused to accept jurisdiction over cases involving temporary injunctions. E.g. *Gibbons v. Ogden*, 6 Wheat. 448, 5 L. Ed. 302 and *Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co.*, 344 U.S. 178, 73 S. Ct. 196. In both cases the highest state court had affirmed denials of motions to dissolve temporary injunctions. In both cases the court held there was no final judgment. In the latter this Court said: "The rule remains unchanged." (344 U.S. at 180, 73 S. Ct. at 197.)

It is plain here that the rights of the parties have not been fully determined by the California Supreme Court. That Court itself expressly ruled that the facts as to jurisdiction, i.e. the facts pertaining to the effect of plaintiffs' business on interstate commerce, were still undetermined and would have to be determined by the trial court. The opinion of the California Supreme Court said that "we agree with the superior court that in the present state of the record there is an unresolved 'factual question' (in addition to questions of law) upon which determination of its jurisdiction may eventually depend. At the present time the allegations as to jurisdiction show at most that upon further proceedings in the basic action questions of federal preemption *may* be presented; but they also show that no

such issue is ripe for resolution in this proceeding." (Pet. App. D at xiii, xiv; emphasis in original.) In short, the critical commerce facts remain to be ascertained. None appear in the record; none were before the California Supreme Court. Upon their ascertainment obviously depends the jurisdiction of the state court.

Furthermore, defendants themselves have prevented the determination of these facts to date. The trial court had set a hearing for March 25, 1958 "limited to the trial of facts going to the question of jurisdiction." (Pet. App. B.) But shortly before that hearing could be held defendants instituted the prohibition proceedings on March 7, 1958. (Pet. 6.) This effectively stopped all trial court action and defendants seem determined to continue to stop it.

B. While Denial of a Writ of Prohibition Is Often a Final Judgment, It Is Not So Here Because the Court Below Expressly Left the Issue of Jurisdiction Open and Instructed the Trial Court to Ascertain the Relevant Facts.

There are decisions by this Court holding that refusals of the California Supreme Court to issue a writ of prohibition were final judgments. *Madruga v. Superior Court*, 346 U.S. 556, 74 S. Ct. 298; *Rescue Army v. Superior Court*, 331 U.S. 549, 67 S. Ct. 1409; *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 52 S. Ct. 103.

These decisions are sound. In each the writ of prohibition had been denied because of a final assertion of state court jurisdiction by California. Thus, in *Madruga* this Court found: "The San Diego Court decided it had jurisdiction and was upheld by the State Supreme Court which declined to issue a writ of prohibition." (346 U.S. at 557, 74 S. Ct. at 299.) In *Rescue Army*, the California Supreme Court similiarly denied the writ because the trial court had jurisdiction (331 U.S. at 552-553, 67 S. Ct. at 1409). Again in

Bandini, the writ of prohibition had been denied because the California Appellate Court had found the statute in question constitutional and accordingly found that the state court had jurisdiction (284 U.S. at 13-14, 52 S. Ct. at 105).

In contrast to these three cases, there has been no decision as to jurisdiction in the present case. Quite on the contrary, the California Supreme Court carefully pointed out, citing recent decisions of this Court, that jurisdiction would exist only if plaintiffs' business did not affect interstate commerce and that this was still an unresolved factual question which the trial court would have to determine. For that reason the court below concluded that the issue of preemption is not "ripe for resolution in this proceeding." (Pet. App. D at xiv.) A judgment less final is difficult to imagine. Once the commerce facts are ascertained normal appellate review, including possible review by this Court, will be available. Until they are ascertained there is not the semblance of a final judgment and nothing to review.

II.

NO SUBSTANTIAL FEDERAL QUESTION WAS RAISED OR DECIDED BELOW AND THE DECISION OF THE CALIFORNIA SUPREME COURT RESTS ENTIRELY ON STATE GROUNDS.

In the trial court and in the applications for a writ of prohibition, the attack on the jurisdiction of the state courts was bottomed entirely on arguments that plaintiffs had "admitted" interstate commerce or that it was "clear" that commerce was affected. The latter argument is patently frivolous in the total absence of facts pertaining to commerce and has not been repeated in the present petition. The argument concerning the alleged "admission" is based on the contents of the answer to defendants' cross-complaint and was disposed of by the California Supreme Court on the basis of state law. The court below said (Pet. App. D at xiii, xiv):

"We are not prepared to hold that the allegations of bare conclusions of law as to jurisdiction establish any facts as to the effect of any alleged labor practice upon interstate commerce (see *Brown v. Aguilar* (1927), 202 Cal. 143, 149 [259 P. 735]; *Kidwell v. Ketz* (1905), 146 Cal. 12, 17, 18 [79 P. 514] [pleader is not bound by allegation or admission of conclusion of law]; *Faulkner v. California Toll Bridge Authority* (1953), 40 Cal. 2d 317, 329 [9], 330 [12] [253 P.2d 659] [conclusions of law are not admitted by demurrer]; *Wheeler v. Oppenheimer* (1956), 140 Cal. App. 2d 497, 501 [3] [295 P.2d 128] [conclusion of law "tendered no issue"]); rather, we agree with the superior court that in the present state of the record there is an unresolved "factual question" (in addition to questions of law) upon which determination of its jurisdiction may eventually depend."

The decision below rests entirely on state grounds. The court decided only that state law supported plaintiffs' claim for relief, *if* state law was applicable. It held that state law could not be applied and that state court would have no jurisdiction if interstate commerce were affected. The only federal question of possible substance, namely whether plaintiffs' business affects interstate commerce, is still undecided and it is undecided because of defendants' deliberate resort to procedures which have to date prevented the ascertaining of the relevant facts.

III.

CALIFORNIA COURTS OBVIOUSLY HAVE THE JURISDICTION AND THE RESPONSIBILITY TO DETERMINE, SUBJECT TO THIS COURT'S POWER OF REVIEW, WHETHER PLAINTIFFS' BUSINESS AFFECTS INTERSTATE COMMERCE.

There is no dispute that state law would apply and state courts have jurisdiction in the event plaintiffs' business does not affect interstate commerce within the meaning of the Labor Management Relations Act. But defendants now

advance the remarkable proposition that state courts have no jurisdiction to determine whether commerce is affected; defendants maintain that the N.L.R.B. has "primary jurisdiction" to make such a determination.

Under defendants' argument no state court could act in any labor dispute once the commerce issue is raised: the court would be powerless to determine the issue. State courts and state labor relation agencies would be rendered impotent by the mere assertion that commerce is affected. This is patently absurd. This Court has innumerable times upheld the power of state courts to rule on the commerce question. While this Court has sometimes disagreed with the *correctness* of a state court determination in this area, it has never questioned the state court's *jurisdiction* to make it. E.g. *Grocery Drivers Union v. Seven-Up Bottling Co., Inc.* (May 4, 1959), ... U.S. ....., 27 LW 3313 (discussed *infra* at 13); *Amalgamated Meat Cutters v. Fairlawn Meats*, 353 U.S. 20, 77 S. Ct. 604; *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26, 77 S. Ct. 607; *Garner v. Teamsters, Chauffeurs & Helpers*, 346 U.S. 485, 74 S. Ct. 161.

This Court has repeatedly pointed out that the Labor Management Relations Act leaves much to the states, e.g. *Garner*, *supra*, 346 U.S. at 488, 74 S. Ct. at 164, and cases there cited. Most obviously left to the states are those cases where commerce is not affected. And throughout the history of the Act state courts have innumerable times made determinations of the commerce issue, subject to the reviewing powers of this Court. Defendants' argument would deprive them of the power even to determine their own jurisdiction.

It should be noted that this Court has had repeated occasions to deal with state court injunctions against picketing of the kind here involved, i.e., picketing for recognition by unions who do not represent a majority of the employees. In each case this Court has upheld state power to act, where

interstate commerce was not affected. *International Brotherhood of Teamsters v. Vogt, Inc.*, 354 U.S. 284, 77 S. Ct. 1166; *Pappas v. Stacey*, 350 U.S. 870, 76 S. Ct. 117; *Building Service Emp. Intern. Union v. Gazzam*, 339 U.S. 532, 70 S. Ct. 784; *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470, 70 S. Ct. 773. California here is applying the same relief to same facts as in these cases and it does so with keen awareness that its power is limited to local commerce.

In fact, the decision below very explicitly states that state courts are preempted from acting here if commerce is affected (Pet. App. D at xv-xvi), as is clear under the line of decisions of this Court, beginning with *Garner, supra*, and ending in the second *Garmon* case, ... U.S. ....., 79 S. Ct. 773.

These cases settle that as to businesses affecting interstate commerce the N.L.R.B. has exclusive jurisdiction over activities prohibited or protected by the Labor Management Relations Act. The first *Garmon* case and its companion cases held this preemption applicable regardless of whether the Board exercised its jurisdiction. In the second *Garmon* case this court held that where the commerce was affected—as had already been found by the state court and this Court (45 Cal. 2d 657 at 659 ff., 353 U.S. at 27, 77 S. Ct. at 607) the Board also had primary jurisdiction to determine whether the conduct there involved was permitted or proscribed by the Act.

Of course none of these cases imply, let alone hold, that state courts may not pass on the commerce question. As we have already seen, this Court has accepted their power to do so, if not always the accuracy of their determination. Accordingly Garmon and its predecessors lend not even colorable support to defendants' contention.

On the contrary, this Court expressly observed in *Garmon II* that its decision withdrew only a "narrow area from pos-

sible state activity * * *" (..... U.S. at ....., 79 S. Ct. at 780.) The specific preemption developed from *Garner* to *Garmon* is far different from defendants' sweeping claim here that state courts cannot act at all even in a wholly local dispute until the N.L.R.B. decides that it does not affect interstate commerce. Defendants' assertion is, thus, completely unsupported by authority or common sense and contrary to settled law.

Only one other point needs comment and that is defendants' claim that *Grocery Drivers Union v. Seven-Up Bottling Co., Inc.* (May 4, 1959), ... U.S. ....., 27 LW 3313, "was reversed on precisely the same issue as involved here" (Pet 15). There the California Supreme Court had recognized that if the business of plaintiff affected commerce, no injunctive relief against the picketing could be granted because of federal preemption, but held that in such an event damages could still be awarded. The commerce facts had not yet been proved, and the California Supreme Court returned the case to the trial court to allow defendants to "prove, if they are able to do so, that the plaintiff is engaged in interstate commerce." 49 Cal. 2d 625 at 628. This followed California's second *Garmon* opinion, decided the same day, 49 Cal. 2d 595. It adopted the same view on the question of damages. Subsequently this Court in its second *Garmon* decision, *supra*, held that California could not award damages where the conduct might be protected or prohibited by federal law. Accordingly this Court also vacated *Seven-Up* and ordered it remanded for modification in light of *Garmon*. The holding of *Seven-Up* is perfectly clear: if commerce is affected, the state court may grant neither equitable nor monetary relief.

Seven-Up of course does not hold that the state court may not ascertain whether commerce is affected. Quite the contrary: this Court ordered modification because under its

Garmon decision the state court was precluded from awarding damages once it is found that interstate commerce is affected. Since the state court opinion had affirmed a damage award, this phase of the case needed modification. Had this Court wanted to preclude the state from even passing on the commerce question, outright reversal with an order to dismiss rather than modification would have been the result. Thus, *Seven-Up* itself illustrates the fallacy of defendants' position.

In *Seven-Up*, the defendants sought and the California Supreme Court gave them an opportunity to plead and prove commerce. Here, too, defendants have been given that opportunity. But rather than avail themselves of it they choose to indulge in the fantasy that state courts may not try that issue.

CONCLUSION

The petition is plainly frivolous and should be denied forthwith. No comment has been made on defendants' argument that the scope of the injunction was improperly expanded (Pet. 16-17), because this contention was not included by them in the questions presented, because defendants cite no authority and because the opinion below shows on its face that no improper change in the injunction was made.

Dated: San Francisco, California, August 24, 1959.

Respectfully submitted,

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